E. SUTHERLAND & CO. *v.* GIBSON.

Sept. 9, 1915.

[86 S. E. 108.]

1. Time (§ 11*)—Time of Delivery—Fraction of Day.—Where a particular day or time is appointed for delivery of goods or the payment of the price, the party to the contract has the whole of the day for performance on his part; and such right is not affected by a custom, where the contract was not entered into in pursuance thereof.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 53; Dec. Dig. § 11.]

2. Customs and Usages (§ 15*)—Evidence—Admissibility.—Parol evidence is admissible to show the custom of the locality where a contract was made, or the usage of trade with reference to which, in the absence of special agreement, the parties are deemed to have contracted.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30-33; Dec. Dig. § 15.]

3. Customs and Usages (§ 17*)—Varying Contract—Evidence.—Where the minds of parties to a written contract have met in an explicit understanding of the terms thereof, extraneous evidence of a custom which alters or varies the terms of such contract is inadmissible.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 34; Dec. Dig. § 17.]

Error to Circuit Court, Russell County.

Action by E. Sutherland & Co. against H. C. Gibson. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

Finney & Wilson, of Lebanon, for plaintiffs in error.
S. B. Quillen, of Lebanon, for defendant in error.

TAYLOR et al. *v.* CARTER et al.

Sept. 9, 1915.

[86 S. E. 120.]

1. Wills (§ 731*)—Construction—Interest of Beneficiaries.—Testator gave his residuary estate to the heirs of his brothers and sisters, and declared that any person taking under the will, who should be indebted to the estate, should pay the debt before participating under the will. Only two beneficiaries were indebted to the testator. One of them was indebted on a note maturing more than 20 years before. The beneficiary, finding that it provided for 8 per cent

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

interest, stated that he would pay only 6 per cent. He did not offer any evidence of payment of the debt. Held, that the presumption of payment arising after 20 years was conclusively rebutted by the facts.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1793-1800; Dec. Dig. § 731.* 13 Va.-W. Va. Enc. Dig. 848.]

2. Equity (§ 325*)—Issues—Statutory Provisions.—Under Code 1904, § 3279, providing that, where a bill alleges that any person made any writing, no proof thereof shall be required unless an affidavit be filed with the pleading denying such alleged fact, an allegation, in a bill by executors for the construction of the will requiring any person indebted to testator's estate to pay the same before participating under the will, that a beneficiary was indebted to testator when the will was made, and remained indebted in a specified sum, with interest, evidenced by a note which the beneficiary had executed, renders proof of the execution of the note unnecessary, in the absence of any affidavit by the beneficiary denying execution.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 641-647; Dec. Dig. § 325.* 8 Va.-W. Va. Enc. Dig. 48.]

3. Appeal and Error (§ 1027*)—Harmless Error—Erroneous Rulings Not Affecting Result.—Where a debt due from a beneficiary to testator's estate exceeded his share in the estate as fixed by the will, though the debt drew only 6 per cent interest, the action of the court in holding the beneficiary liable for 8 per cent interest on the debt was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.* 1 Va.-W. Va. Enc. Dig. 582.]

4. Wills (§ 512*)—Estates Devised—Beneficiaries—"Heirs."—Testator gave his personal estate to the heirs of his brothers and sisters in equal parts. He had three brothers and three sisters, all of whom had descendants. Only one brother was alive when the will was made, but testator believed that he also was dead. Held, that the estate must be divided into six equal parts, so that the descendants of the brother alive at the time of the making of the will would take as if he had been dead at that time, though a living person has no "heirs" according to the strict technical import, for the word may mean children or descendants of a living person, or other kindred not within the technical definition of the word (citing Words and Phrases, Heirs).

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1074, 1075; Dec. Dig. § 512.* 13 Va.-W. Va. Enc. Dig. 806.]

5. Wills (§ 646*)—Construction—Rights of Beneficiaries.—Under a will whereby testator gave to the heirs of his brothers and sisters the remainder of his personal estate in equal parts, and whereby he declared that any beneficiary indebted to the estate should pay the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

same before participating in the estate, beneficiaries indebted to the estate must pay the debts before they can participate under the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1532; Dec. Dig. § 646.* 13 Va.-W. Va. Enc. Dig. 847.]

Appeal from Circuit Court, Scott County.

Suit by D. E. Carter and another, executors of the will of W. P. Hickam, deceased, against I. F. Taylor and another, for the construction of the will. From a decree construing the will, defendants appeal. Affirmed.

W. S. Cox, of Gate City, and Richmond, *Chambers & Bowlin,* of Chattanooga, Tenn., for appellants.

S. H. Bond, of Gate City, for appellees.

VIRGINIA IRON, COAL & COKE CO. *v.* ASBURY'S ADM'R.

Sept. 9, 1915.

[86 S. E. 148.]

1. Master and Servant (§ 229*)—Injury to Servant—Liability—Obligation of Servant.—An employee must exercise care to avoid injuries to himself, and must provide for his own safety from such dangers as are known to him, or discernible by ordinary care, and must take ordinary care to learn the dangers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 674, 683; Dec. Dig. § 229.* 9 Va.-W. Va. Enc. Dig. 692.]

2. Master and Servant (§ 241*)—Injury to Servant—Contributory Negligence.—A miner of long experience contracted to remove pillars of coal from rooms of a mine after the main body of the coal had been removed. He knew that the work was more dangerous than the usual removal of coal when pillars were left standing. He worked on a pillar for two or three days, when a piece of slate, about 15 feet in length, 11 feet in width, and 3 feet in thickness, fell on him. There was a slip on the edge that was apparent to any one. The roof was sounded, and found not to be solid. There was but one prop under the slate, and this was toward one end of it. This condition was seen by others, and the miner in the exercise of reasonable care would have known it. Held, that he was guilty of contributory negligence for failing to exercise reasonable care for his own protection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 757; Dec. Dig. § 241.* 9 Va.-W. Va. Enc. Dig. 702.]

3. Master and Servant (§ 228*)—Statutory Regulations—Construction.—The purpose of Mining Act (Acts 1912, c. 178), requiring each

---

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.